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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x
4 UNITED STATES OF AMERICA,

v.

17 CR 684 (ER)

5 CHRISTIAN DAWKINS AND MERL
6 CODE,

7 Defendants.
8 -----x

9
10 New York, N.Y.
11 May 7, 2019
12 9:00 a.m.

13 Before:

14 HON. EDGARDO RAMOS

15 District Judge

16 APPEARANCES

17 GEOFFREY S. BERMAN
18 United States Attorney for the
19 Southern District of New York
20 ROBERT L. BOONE
21 NOAH D. SOLOWIEJCZYK
22 ELI J. MARK
23 Assistant United States Attorneys

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CHANAY LEGAL SERVICES, LLC
BY: DAVID A. CHANAY, JR.
-and-
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ALSO PRESENT: JOHN VOURDERIS, Special Agent FBI
YOLANDA BUSTILLO, Paralegal Specialist USAO
EMILY GOLDMAN, Paralegal Specialist USAO

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1 (Jury not present)

2 THE COURT: OK, folks. Is everyone here that we're
3 expecting?

4 MR. MARK: Yes, your Honor.

5 MR. CHANEY: Yes, sir.

6 THE COURT: I received the parties' responses or
7 proposed instruction response to the jury's question which, as
8 I understand it, is: Can the university be deprived of the
9 honest services of a coach if it knew or should have known that
10 the coach violated NCAA rules or their contract.

11 The government's submission asks me to instruct the
12 jury that it is irrelevant if the university itself was
13 negligent or gullible. And the defense points out correctly, I
14 think, that that's not really responsive to the jury's request;
15 the jury is not asking should the university have done more;
16 the jury is asking if the university knew it was defrauded.

17 So, Mr. Mark.

18 MR. MARK: Your Honor, the reason we requested for
19 those additional instructions is I think the defense sort of
20 misreads the note in the most helpful fashion for themselves.

21 First, the note, as your Honor probably recognizes, it
22 uses a legal term that was not at issue at all in the jury
23 instructions, the arguments of counsel or anybody else,
24 "willfully ignorant," which actually is a more complicated
25 legal term.

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1 The crux of the note is really, as it says, is whether
2 a university can be deprived of the coaches' honest services if
3 they knew or if they were expecting the coach was willfully
4 violated NCAA rules -- broadly, right -- or violated their
5 employment agreement, broadly. These are very broad terms.

6 The defense sort of interprets that as knew about the
7 alleged conduct here, which would be concealed bribes. There's
8 absolutely no record evidence at all in this case about the
9 universities knowing, under whatever level of knowledge you
10 want about concealed bribes. The defense obviously contested
11 those are bribes. But to the extent that, as we argue, they
12 are bribes, there is no evidence at all to support knowledge of
13 the universities.

14 So the question really is, is -- they're trying to say
15 that they -- the question is about the alleged conduct here but
16 that's not what note says. It's just about violations of NCAA
17 rules. And the short answer to that, candidly, is, yes,
18 clearly they can -- the university can. They read it as no but
19 yes.

20 THE COURT: Yes what?

21 MR. MARK: Yes, a university can be deprived of its
22 honest services even if they expect or willfully knew that a
23 coach would violate the NCAA rules or their employment
24 agreement.

25 THE COURT: So why can't we just tell the jury that?

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1 MR. MARK: Your Honor, I think we can just tell them
2 just that short answer and probably we can just refer them back
3 to your instructions that define that element as well.

4 We proposed this additional instruction just to try to
5 be a little more responsive to what was going on there. But I
6 think then we can just go with the short answer; just yes, and
7 sort of stem off this sort of side issue that there is no
8 record evidence.

9 THE COURT: Actually let me ask about that. Is there
10 no record evidence that the universities knew or did not know?

11 MR. MARK: About what is charged here? We're talking
12 about the bribes?

13 There's no record evidence that the universities knew
14 about the bribes here. To the contrary, obviously there's
15 plenty of evidence the defendants took elaborate steps to try
16 to conceal this evidence.

17 THE COURT: Before the defense stands up, what about
18 the testimony concerning -- I don't know whether it was Wade or
19 Miller and the things that they were making. Assuming that
20 that's true, assuming that that -- that's before the jury, how
21 do we -- what am I to make of that?

22 MR. MARK: You're to make of that two things. One,
23 payments to players are a little bit separate; two is whether
24 that individual actually stands for the university is a
25 complicated issue. This actually was very heavily litigated in

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1 the Gatto case, right, which is when a particular individual,
2 an authorized representative of the university, as relevant to
3 whether that university can be defrauded. That was the subject
4 of significant instructions in the Gatto case. And goes to
5 essentially whether that individual is unconflicted. There's a
6 multipart test United States v. D'Amato, a Second Circuit case,
7 that goes to whether an unconflicted representative -- whether
8 that representative here, you know, say Sean Miller; in the
9 Gatto case, say Rick Pitino, the head coach of Louisville
10 really is somebody who is unconflicted. And we probably
11 suggest that we don't go sort of down that path because that
12 really isn't at issue here. And if we do -- I mean we can
13 obviously propose language to your Honor that would be taken
14 from D'Amato and taken from Judge Kaplan's charge in Gatto that
15 could layout that.

16 MR. HANEY: Your Honor, I'm going to go first and then
17 Mr. Allen wants to speak as well -- Mr. Chaney, I'm sorry.

18 The jury is doing what the jury should be doing. The
19 jury is engaging in discourse. They are a smart jury, as the
20 Court has noted. They have a lot of experience, I believe, in
21 the athletic space in terms of what their general knowledge is
22 of what these schools do.

23 Obviously, they're having conversation right now about
24 what they know to be the willful ignorance and the plausible
25 deniability of these schools that are making hundreds of

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1 millions of dollars off of this type of conduct. And they are
2 asking a very legitimate question that has nothing to do with
3 gullibility. They're asking question -- I believe they're
4 having a conversation about whether or not these schools should
5 be perceived as a victim in some manner because they are being
6 willfully ignorant to the conduct that the coaches are engaged
7 in, which is bringing in elite level recruits so they can make
8 hundreds of millions of dollars at the university.

9 So I would ask the Court allow them to talk this
10 through the themselves. They are a smart jury. They have the
11 instructions. They have the law. They have their facts. The
12 athletic -- associate athletic director from South Carolina, he
13 testified, part of compliance, his job, his job and being with
14 the NCAA is to monitor these coaches, monitor their cellphones,
15 read their text messages during the live recruiting period.

16 So I think they're having the conversation that they
17 should have and that a jury should engage in as they're
18 deliberating. And the government wants to use perhaps what
19 happened at the Gatto case or try to narrow that conversation
20 and not allow them to have that more global discourse of
21 whether or not these schools could somehow be defrauded when
22 some of them don't feel that they can based on what their
23 understanding is.

24 THE COURT: Mr. Haney, you just engaged in 98 percent
25 speculation as to what the jury is discussing, what they are

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1 considering and you suggested that they should be allowed to
2 decide this case based on evidence not in the case.

3 So my question to you is why isn't the answer to their
4 precise question: Yes, the university can be defrauded even if
5 at the very highest levels of the university they knew or
6 suspected that their coaches weren't following NCAA rules?

7 MR. CHANEY: Your Honor, I think the case law cited in
8 our proposed answer comes out exactly simply the answer is no,
9 they cannot be defrauded. To be defrauded means you've been
10 deceived. If you get exactly what you expected you have not
11 been defrauded. And the case law is pretty clear on that. And
12 that really just comports with common sense as well. How
13 can -- and the jury -- and this precisely the point that the
14 jury is asking about. If we believe that a university got from
15 their employees exactly what they expected to get from their
16 employees, have they been the victims of a fraud?

17 THE COURT: Yeah, but the question for me in my mind
18 that I'm trying to work through is: The university is the
19 university. And individuals, no matter how high they may be up
20 in the university, are not the university. So let's say, for
21 example, to put it in its starker terms, which is what I'm
22 trying to do. If the president of the university, whether it's
23 Arizona or USC or South Carolina -- this is just by way of
24 hypothetical, I'm not suggesting that this happened -- if the
25 president of the university or the head coach of the university

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1 when they hired Mr. Richardson or Mr. Bland, etc., said to
2 them: Look, you're going to have to sign these contracts,
3 these employment agreements, that say you can't violate these
4 rules. But you know and I know that what you need to do is
5 that you make sure to identify and recruit and land the very
6 best high school students to come to our university. Even if
7 that happened, isn't the university itself defrauded?

8 MR. CHANEY: I don't know what the entity the
9 university is outside of the people that it's composed of. So
10 to the degree that the case law routinely sort of discusses an
11 employer/employee relationship and whether or not the employer,
12 generally speaking, received what it expected from its employee
13 or not what it expected from its employee, and whether or not
14 that sort of failure of expectation was the result of fraud or
15 deceit I think is directly relevant -- I'm sure directly at
16 issue in this case. The Court -- I'm sorry, Mr. Haney properly
17 pointed out the testimony of Chance Miller who was in charge
18 with -- in charge of overseeing, sort of broadly speaking, NCAA
19 compliance at the University of South Carolina. The evidence
20 came out that he was monitoring cellphones, exactly the same
21 way that the FBI was monitoring cellphones. So, presumably,
22 the jury has heard information that the same text messages,
23 phonecalls, information that was presented to this jury by the
24 government was also available to Chance Miller. And they all
25 heard testimony that Chance Miller did nothing about it, that

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1 he never alerted the NCAA or the FBI about potential recruiting
2 violations.

3 THE COURT: Except that you're jumping to a conclusion
4 there that Mr. Miller did overhear potential violations of NCAA
5 rules.

6 MR. CHANEY: I'm simply pointing out that the jury is
7 able not just to hear direct facts and use those but all
8 reasonable inferences drawn therefrom and I think a reasonable
9 inference from Mr. Miller's testimony is that he received
10 information of recruiting violations and rather than bring it
11 to anybody's attention, I think based on the question, the jury
12 is saying well did -- was he receiving, was the University of
13 South Carolina in the case of Lamont Evans receiving exactly
14 what they expected from their employee? And if that's the
15 case, they simply have not been defrauded.

16 MR. MARK: I mean Mr. Chaney's reasonable inference
17 based on Mr. Miller's testimony is actually rank speculation,
18 completely contrary to his testimony.

19 THE COURT: Let's just say that Miller did overhear
20 something.

21 MR. MARK: OK. Let's say that Miller did. This is
22 then, once again, I want to try to take us back to the note a
23 little bit, like which is, it says let's say Miller is
24 monitoring phonecalls. Continue with our hypothetical, right.
25 And one of the things they monitor phonecalls is for contacts

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1 between coaches and recruits. We've heard testimony that it's
2 one of the things that universities do, right, because
3 Mr. Dawkins talked about how he tried to avoid that detection.

4 And let's say there's a violation of those rules,
5 right. So the university knows that there's contact between
6 the university through, you know, a representative like Chance
7 Miller knows that there's contact between a recruit and a
8 coach. The rules are being violated, right. NCAA rules are
9 being violated.

10 Can they be deprived of their honest services by a
11 concealed bribe? Yes. They can. End of story. Like we don't
12 need to go along these expansive hypotheticals. That answer
13 clearly is yes, they can. And that's the problem with this
14 sort of broad view of like a violation of NCAA rules. So
15 that's one thing.

16 Then too, to your hypothetical of: Well what if
17 Mr. Miller, compliance officer, knew, completely contrary to
18 his testimony which said he didn't know, and that person would
19 have been fired. Continuing along that way. Then the question
20 becomes: Is he an actual agent of the university? That
21 question is: Is he unconflicted? Are his interests completely
22 aligned with the university? And there it would be definitely:
23 No, he isn't. So that even if we go along that hypothetical we
24 still, you know, the defense's requested answer still falls.

25 THE COURT: What about if it's the head coach of

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1 Nevada?

2 MR. MARK: Same answer, your Honor.

3 THE COURT: What about the president of Nevada?

4 MR. MARK: I think it would largely -- corporate
5 forums differ a bit. A lot of these schools, it's not in
6 evidence, have boards. So there is no evidence about
7 presidents knowing or boards know. I'm not a corporate lawyer
8 but I think it would probably then go a little bit to the
9 corporate forum and whether that person is sufficiently high up
10 such they're aligned with the university and they're
11 unconflicted.

12 THE COURT: I think that's right. I think -- which is
13 why putting the hypothetical as I did, which, again, I just
14 want to sort of get to the bottom of this, even if the
15 president knew and engaged in activity that violated rules and
16 hired someone with that understanding that that individual
17 would not only flout those rules but use -- otherwise meet the
18 evidence of the federal bribery statute or honest services
19 fraud statute, I think the president's hiring of that
20 individual does not absolve the individual.

21 MR. MARK: Yes, your Honor.

22 THE COURT: Mr. Chaney or Mr. Haney.

23 MR. CHANEY: Your Honor, I -- that seems to defy what
24 it means to be the victim of a fraud. Reading from Finnerty,
25 if consumers in that case are getting exactly what they expect,

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1 then the conduct is neither deceptive nor fraudulent.

2 Reading from the Court's own jury charges, the
3 employer is not -- thus, the employer is not receiving what it
4 expects and is entitled to, namely, the right of the employee's
5 honest and faithful services, once again coming back to what
6 the employer expected, and that the crux of the bribe being
7 them receiving not what they expected but something they did
8 not expect.

9 THE COURT: That's precisely the point, right. It
10 begs the question: Who is the employer? If I own a business
11 and it's my business personally and I hire someone and I
12 understand that my employee is doing something that he or she
13 ought not do and that in some way benefits my company but in
14 some way is deceptive and in a way that would fit within the
15 definition of honest services fraud, I can't then, as an
16 individual, then cry foul, right?

17 But if you're a corporation and the CEO is the
18 employer or the ultimate person in charge of the organization
19 or the executive in charge of the organization, and the CEO
20 knows that activity is taking place that violates the various
21 statutes that are at play here, is it a defense that the CEO
22 knew what I was doing?

23 MR. CHANEY: So I think there's two -- there's two
24 separate elements of the fraud charge that are at issue here.
25 And one that has not been discussed is the specific intent to

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1 defraud. And so I think -- the common understanding of what it
2 means to deceive a university, to deprive them of what they
3 expected, the common lay understanding of what that would be
4 would come into play when we're assessing somebody's specific
5 intent. If the information available to the actors, to the
6 defendants in this case, is that universities expected these
7 coaches to engage in sort of rampant NCAA violations and that
8 they would, in fact, be fired if they did not violate NCAA
9 rules in the recruiting practice insofar as they would not be
10 getting players, then those defendants could not, under that
11 understanding, engage in a scheme to defraud the university
12 because what they're -- the conduct they're engaging in is
13 giving the universities' employees that are behaving exactly as
14 the universities expected. So the sort of agent who can speak
15 for the university sort of rabbit hole that we're going down I
16 think is not necessarily -- I think the common, the lay
17 understanding of what it means for the university to get
18 exactly what they expected, exactly what they intended to get
19 out of their employees, in this case their basketball coaches,
20 is what the jury is asking about. And I think that the
21 defense's answer that puts basically the fact that if an
22 employer is receiving exactly what it expected from its
23 employees it's not been defrauded is the simplest and most
24 direct answer to the jury's question.

25 To the degree that there is a complete lack of

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1 consensus and both parties believe that the Court has read the
2 applicable law already to the jury in terms of their decision
3 in this case, then I think our alternate proposed answer would
4 simply be for the Court to tell the jury that they have
5 received all of the law applicable in this case and that they
6 are to use their reason and common sense in coming to a
7 decision.

8 MR. HANEY: Your Honor, I would add too that defining
9 who is the university is a very difficult thing to do, as we've
10 just noted. The government hasn't done it. We haven't done
11 it. I don't think anyone has really defined who is the
12 university. Is it the president? Is it the head basketball
13 coach? I don't believe we're going to be able to accomplish
14 that at this juncture.

15 But certainly the difference between being gullable
16 and being willfully ignorant, I would submit are completely two
17 different things. The question the jury is asking, without
18 getting lost in the woods here, is whether the university can
19 be defrauded if they're willfully ignorant.

20 And we're not going to define who the university is.
21 That's not something we can accomplish right now. Certainly we
22 as a group can understand the difference between a jury asking
23 about willful ignorance and then trying to muddy the waters by
24 saying maybe they meant gullibility.

25 THE COURT: I agree with that.

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1 MR. HANEY: Thank you, your Honor.

2 MR. MARK: Your Honor, I think in light of this
3 conversation, I think what our proposal would be is a short
4 answer of yes and then a referral back to the jury instructions
5 here on the first element of a scheme to defraud, which is
6 defined over the course of four pages. So I think that would
7 probably answer them, their direct question and refocus them on
8 the jury instructions that they have.

9 MR. HANEY: We would agree a hundred percent but say
10 no and refer them exactly in the manner Mr. Mark suggested.

11 THE COURT: Except I think that's wrong as a matter of
12 law.

13 MR. HANEY: Thank you.

14 MR. CHANEY: They're not asking who the university is.
15 They're assuming that it is the university, whatever it is,
16 whatever the entity the university is, which is the alleged
17 victim in this case, the victim of the fraud.

18 Their question presumes -- assumes that that
19 university, whatever that entity is, is what expected this
20 conduct from their -- they're not asking the Court the question
21 that we've been arguing about. They're assuming that the
22 answer -- they're assuming that the knowledge, the willful
23 ignorance is on the part of whatever the entity university is.
24 And so I think because that's the case the answer is no, they
25 cannot be defrauded if they expected this conduct from their

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1 employer.

2 THE COURT: Mr. Mark.

3 MR. MARK: I mean I think Mr. Chaney just said he
4 assumed what the question is and then assuming what the
5 question is wanted to give an answer that's beneficial to him.
6 I think we should respond to the actual note and what it says.

7 MR. CHANEY: I can read it into the record if Mr. Mark
8 thinks I'm mischaracterizing it.

9 THE COURT: No need.

10 You had an alternate approach, Mr. Chaney?

11 MR. CHANEY: Yes, your Honor. I think that to the
12 degree that the parties, one proposes the answer is yes and the
13 other proposes the answer is no, and so that the appellate
14 record is clear our proposed answer is what we submitted to the
15 Court, but if the Court is unwilling to give our proposed
16 answer, I think it would also be appropriate for the Court
17 simply to instruct the jury that they have received all of the
18 law that is applicable to this case and it is for them to use
19 their reason and common sense in applying that law to the facts
20 as they have received them.

21 THE COURT: What about the idea that there is no
22 record evidence in this case about what the universities knew
23 or did not know?

24 MR. CHANEY: Your Honor there is -- I think there's
25 two broad lines of testimony that the jury has received that

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1 they could be relying upon in asking this question. One sort
2 of broad category are the several references to Sean Miller at
3 the University of Arizona as a head coach, whether or not he
4 was part of it, whether or not he was Book Richardson's boss,
5 his superior, sort of kind of -- whether or not he's the
6 university or not. They could be talking about it that way.
7 And that would be sort of one broad category of testimony they
8 could be relying upon for going down this line of questioning.

9 I think the other would be the testimony of Chance
10 Miller insofar as he testified about his role at the University
11 of South Carolina in ensuring compliance, particularly for NCAA
12 men's basketball at the University of South Carolina.

13 He testified to the various ways in which he, while at
14 the University of South Carolina monitored the compliance with
15 NCAA rules by their college basketball coaches which would have
16 included Lamont Evans, that included listening to phonecalls,
17 reviewing text messages, and included checking their vehicles,
18 their houses, making sure that they weren't contacting recruits
19 during dead periods. And so because Mr. Miller testified that
20 he would have been reviewing in real time the contact that
21 Mr. Evans was having with recruits, including on the phone,
22 which would have overlapped with the time of PJ Dozier, it all
23 overlaps with the evidence they heard in this case about these
24 defendants, then they -- and it's true. He testified that he
25 didn't know that Lamont Evans was doing this with PJ Dozier. I

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1 would submit to the Court that that was a fairly self-serving
2 declaration by Mr. Miller and the jury would be free to reject
3 that claim by Mr. Miller if they believed that the facts did
4 not support it.

5 MR. MARK: I don't really necessarily think it's
6 productive for me to sort of get into an argument about what
7 Chance Miller said or didn't say but, just briefly, I don't
8 think there's any record evidence that he was -- had a wiretap
9 on Mr. Evans' phone or was reviewing in real time his calls or
10 his text messages.

11 I think to the extent your Honor is considering an
12 instruction that talks about them, to focus them on the
13 evidence, I think given this nature of this question, I think
14 it's also important to refocus them on that their obligations
15 are to disregard anything you may have seen or heard about this
16 case outside the courtroom. That's not evidence. And so a lot
17 of I think what Mr. Haney was arguing earlier about how to
18 interpret this note really goes into the things of I think his
19 interpretation based on his knowledge, his experience about
20 college basketball. And we obviously --

21 THE COURT: And arguments that were made.

22 MR. MARK: Also arguments that were made.

23 And we have a jury. We all sort of understood that we
24 have a jury with a number of jurors who do have some
25 experience. And they all said they were going to be able to

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1 set that aside, their views of the NCAA rules, their own
2 experience, and evaluate this case based on the evidence
3 presented.

4 So to the extent your Honor is considering a note that
5 sort of deals with some of that, I would also request that it
6 encourage the jury and refocus them just to consider their --
7 in evaluating their determinations just by the evidence here in
8 this court and arguments that were made.

9 MR. HANEY: I would just briefly add there was record
10 evidence that the head coach at the University of Arizona was
11 not just aware but was complicit in much of what was occurring
12 at Arizona with respect to paying players and violating NCAA
13 rules which then turns us back to: Who is the university?

14 Now I'm not suggesting that Sean Miller is the
15 University of Arizona by any means. But this was not a case
16 about some fraud going on at the chemistry lab. This is a case
17 that was about basketball at Arizona and he was the leader of
18 that particular portion of the university. Certainly, he was
19 not willfully ignorant. He was an active participant in much
20 of the conduct that there is a lot of record evidence that
21 exists in the case.

22 I just would ask that the Court, as Mr. Chaney noted,
23 let the jury figure this out. They're a smart jury. They have
24 the rules. They have the instructions and they listened very
25 intently to the case and they are very familiar with the facts

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1 of the case.

2 But, again, I don't think we can narrowly define to
3 the government's satisfaction that the university in no manner
4 could include those that there's record evidence were complicit
5 in everything that happened in this case including the head
6 basketball coach.

7 Thank you.

8 MR. MARK: Just since Mr. Haney brought up Sean
9 Miller. As we talked about and I think as he acknowledged,
10 Mr. Sean Miller is not the university here. So sort of going
11 down that road obviously then puts into play a whole host of
12 other things about who is the university and when can an agent
13 bind the university.

14 We're not proposing that language here because we
15 don't really think that this is responsive or really the crux
16 of what the jury is looking at.

17 But, as I said, if your Honor thinks that's something
18 that you want, we obviously can propose language to that
19 effect.

20 THE COURT: OK. So I guess what I am at this juncture
21 intending to do is to instruct them as Mr. Chaney's alternate
22 recommendation, that you have received all the law applicable
23 to this case and it is for you to apply that law to the facts
24 as you determine them to be. And I think I might also say that
25 they should base this case based on the evidence that's been

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1 presented at trial.

2 MR. HANEY: Seems fair, your Honor. Thank you.

3 MR. MARK: I mean, your Honor, I don't disagree that
4 the substance is accurate but remember how we sort of started
5 this is like we were trying to be responsive to the question.
6 That's not actually responsive to the question. So we would
7 encourage your Honor to respond to the question yes, and then
8 we can add on the additional language that Mr. Chaney has
9 proposed with your Honor's modifications. I think that would
10 both answer the direct question and refocus them on the
11 particular law that they're supposed to apply and the evidence
12 that they're supposed to consider, which is really their
13 obligations here. So we can respond to the question and then
14 refocus them on the law and the evidence. We would propose
15 that -- that would be the best course, your Honor.

16 MR. CHANEY: Your Honor, this question does not ask
17 who the university is. If we take that question out, who is
18 the university, and simply answer the question that they ask,
19 the answer is no. Straightforward. The answer is no.

20 And so to the degree that Mr. Mark and I disagree 180
21 degrees about what the answer is, I don't think it would be
22 appropriate for the Court to use the defense's alternate
23 instruction and then append either to the front or the back
24 Mr. Mark's conclusion.

25 MR. MARK: Your Honor, I think the fact of the matter

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1 is -- I mean I know we're going to keep disagreeing about the
2 answer. The way they propose their short answer is the
3 particular conduct alleged in the indictment. So their
4 particular focus of their answer is not on the question.

5 But putting that aside, as I think we've already made
6 our point, like the answer is yes. So we would propose that
7 there is a simple short answer to this, that we answer them
8 that way, and then if they have more notes we can try to
9 respond to the additional notes as necessary.

10 THE COURT: I have to say, Mr. Chaney, I disagree with
11 your reading of the note. I think the answer to the question
12 is clearly yes. Obviously, the university can only make
13 determinations and engage in expectations through the
14 individuals that run the university. And that doesn't mean
15 that the individuals who engage in wrongdoing are thereafter
16 free to do what they want. I mean it's -- I mean I know that
17 this sounds familiar but it's not as if -- if the president
18 say, of the university, were to say -- were to tell someone to
19 do something, it doesn't become legal because the president
20 tells them to do it. So I do think the straight answer is yes.
21 And the university itself can notwithstanding buy in at the
22 very highest levels of the university be defrauded.

23 Give me five minutes.

24 (Recess)

25 THE COURT: So this is what I'm going to do. I'm

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1 going to give the alternate version suggested by Mr. Chaney and
2 indicate to them that obviously they are required to decide
3 this case based solely on the evidence that's been presented
4 here at trial without telling them yes or no. And if they want
5 any further explanation, they are actually quite prolific.
6 We've got another two notes. Neither substantive. They'll let
7 us know.

8 MR. HANEY: Thank you, your Honor.

9 THE COURT: And they want an answer now. So we're
10 going to bring them out.

11 So the other two notes which I'll read into the record
12 is one they want white board markers and they want to know when
13 we're going to give them an answer to yesterday's note.

14 MR. CHANEY: It's been eating at them all night.

15 MR. MARK: Your Honor, I know this is probably a lost
16 cause but I always think particularly at the beginning of a
17 trial sort of tough when we don't sort of directly respond to
18 their note and this is clearly a hypothetical note. I mean it
19 starts out "can something" and --

20 (Jury present)

21 THE COURT: Everyone please be seated.

22 Good morning, ladies and gentlemen. I trust you all
23 had a pleasant evening.

24 We have received your two notes from this morning. Be
25 assured that we are working on getting you those markers and we

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1 are going to answer your question from yesterday now. I
2 discussed this with the parties and it this is what the Court
3 has determined to provide you.

4 And it is this: You have received all law applicable
5 and it is for you to apply that law to the facts as you have
6 determined them to be and in that regard you are also reminded
7 that you are to decide this case based solely on the evidence
8 or lack of evidence that was presented to you during the course
9 of the trial.

10 OK. If you have any subsequent questions we'll be
11 happy to address them as soon as possible.

12 All rise.

13 I apologize that we don't have an escort.

14 (Jury not present)

15 THE COURT: OK. Be available. I think we're going to
16 get some more notes.

17 (Recess pending verdict)

18 (In open court; jury not present; time noted: 4:25)

19 THE COURT: I have another note. It reads as follows.
20 We have a hard stop of 4:40 including coming back into the
21 courtroom. It is unlikely that we will reach a verdict today
22 so an alternate needs to be called.

23 OK. So let's bring out Mr. Stix in the first
24 instance.

25 Court Exhibit 5?

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1 THE DEPUTY CLERK: Yes.

2 MR. MARK: Your Honor, I just thought of one thing and
3 I don't know, and I haven't researched this issue at all, but
4 I'm just going to raise one thing to you which is I know that
5 now we're going to be down to one alternate. I've never had a
6 situation where an alternate was excused for a brief travel
7 period. But I'm just wondering --

8 (Juror present)

9 THE COURT: Mr. Stix, could you please step forward
10 and sit in seat number one here, OK.

11 JUROR: OK.

12 THE COURT: Everyone can be seated.

13 Mr. Stix, we've been made aware that you have some
14 travel plans that are -- that you've made some time ago; is
15 that correct?

16 JUROR: Yes.

17 THE COURT: And I take it that you are not able to
18 change these plans?

19 JUROR: No, I am not.

20 THE COURT: So, Mr. Stix, we're going to have to
21 excuse you. I'm very, very sorry that you're not going to be
22 able to complete this process. I know that I've been watching
23 you. You've been paying a great deal of attention and I'm sure
24 that you would have wanted to go through with this if you
25 could. So I want to thank you on behalf of the parties for

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1 your service and you are excused.

2 JUROR: Thank you.

3 (Juror excused)

4 MR. MARK: Your Honor, just before he --

5 THE COURT: OK. Jazmin.

6 MR. MARK: Your Honor, can we just have a brief
7 sidebar.

8 THE COURT: Don't bring him out just yet.

9 MR. MARK: I just want to put this on the record right
10 now which is that I know we're down -- going to be down to one
11 alternate and I know the jurors collectively had an expectation
12 of two weeks and I don't know if we're going to run into other
13 people's plans that are sort of immovable.

14 What I wanted to raise, and I don't know what
15 defense's position is on this and I've never had this come up
16 which is, obviously, he's only to be excused for his
17 unavailability for a prior travel arrangement. But I wonder --
18 and I've never had this happen before -- which is whether if he
19 essentially can sort of be as a standby alternate if we have
20 problems with -- as I said, I haven't researched this and it
21 was just something that we were thinking about if that came up
22 to the situation.

23 THE COURT: The answer is no. OK.

24 So let's -- so what I'm going to do is I'm simply
25 going to tell the jury that Mr. Stix has been replaced. He'll

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1 be replaced by juror no. one. We're going to contact her.
2 Hopefully she'll be here tomorrow morning. I would expect all
3 of them to be here tomorrow morning by 9:30 but they should not
4 begin deliberations until she is in the room and that
5 deliberations start essentially from the beginning. OK. Let's
6 bring them out.

7 Mr. Stix has a question as to whether he is free to
8 discuss the case with his wife and family. My instinct is to
9 tell him no until we contact him and let him know that the case
10 is finally over.

11 MR. MARK: We think that's the best course, your
12 Honor.

13 MR. HANEY: That's fine, your Honor.

14 MR. CHANEY: I don't have a position.

15 THE COURT: OK. So we can bring him out also. So he
16 can come out with the rest of the jury.

17 Since he has deliberated with the jury there is a
18 substantial -- well, it may be the case that if he discusses
19 it, it may get out and people will know where the jury stands.

20 (Jury present)

21 THE COURT: Everyone be seated.

22 Ladies and gentlemen, I do have another note from the
23 jury. It reads as follows. How do we treat our deliberations
24 in light of the alternate juror coming in?

25 Excellent question.

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1 First of all, to answer Mr. Stix's question that he
2 put to us through Ms. Rivera. Mr. Stix, I will direct you
3 not -- to continue not to discuss this case even with your
4 family or with your wife until you have been advised by us that
5 it is finally complete. The fear is that there is a risk that
6 if you do discuss it, it may get out and individuals other than
7 the jury may find out how the jury stands. So I would ask and
8 I will direct you to continue to abide my instructions not to
9 discuss the case.

10 With respect to the balance of the jurors, an
11 alternate will be called. Hopefully she will be here and will
12 be able to join us by no later than 9:30. I will ask you to be
13 here by 9:30. However, you may not deliberate until the
14 alternate arrives. And once the alternate arrives you are to
15 treat deliberations as though they are beginning from the
16 start. OK. Now, obviously, you've all had discussions but you
17 will treat the alternate juror as, obviously, a full juror and
18 treat the discussions as though they are at the beginning. OK.

19 And with that, I am mindful of your hard stop. So
20 please have a wonderful evening. Do not discuss the case. Do
21 not read anything about the case. And please try to get here
22 by 9:30 a.m. and we will make sure that we can get the
23 alternate here by 9:30 as well.

24 Have a wonderful evening.

25 (Jury not present)

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1 THE COURT: OK. Anything else?

2 MR. MARK: No, your Honor.

3 MR. HANEY: No, your Honor.

4 MR. CHANEY: No, your Honor.

5 THE COURT: Have a wonderful evening everyone. We'll
6 get you copies of the notes.

7 (Adjourned to May 8, 2019)

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